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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 652.

CARL HALFERTY AND J. B. HALFERTY, DOING BUSINESS AS HALFERTY BROTHERS ET AL., PETITIONERS,

VS.

HAWKEYE CASUALTY COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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OCTOBER TERM, 1942.

No. .....

CARL HALFERTY AND J. B. HALFERTY, DOING BUSINESS AS HALFERTY BROTHERS ET AL., PETITIONERS,

VS.

HAWKEYE CASUALTY COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petition of Carl Halferty and J. B. Halferty, Doing Business as Halferty Brothers, for a writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit to bring before the Supreme Court the case of Hawkeye Casualty Company, a Corporation, Plaintiff-Appellant, vs. Carl Halferty and J. B. Halferty, Doing Business as Halferty Brothers, Defendant-Appellees.

Said petitioners respectfully show to this Honorable Court as follows:

SUMMARY STATEMENT.

The proper interpretation of the Declaratory Judgment Act (Judicial Code, Sec. 274d, 28 U. S. C. A. 400) is enacted in this procedure.

a. The majority opinion, rendered October 29, 1942, is erroneous, in the construction it makes of the Missouri Legislative Act regarding Commercial Trucking and in its construction of that law it not following the plain intent of the enacting body, the essence of which was to regulate this Service in the public interest, guarding and securing public safety, and to achieve adequate, efficient and economical service, and instead of "Insurance for Commercial purposes" as Commercial is defined, by said opinion, the reasoning recited is contradictory thereof

b. That said majority opinion improperly construes the policy in controversy, by giving priority or preference to the endorsement "Exclusion on Commercial Truck" and thus annuls the Missouri Law as required by Vol. 1, Sec. 5729, R. S. Mo., 1939, p. 1422, as follows:

> "Section 5729. No certificate of convenience and necessity or contract hauler's permit shall be issued by the public service commission until and after such carrier shall have filed with and same has been approved by, the commission of this state, a liability insurance policy or bond in some reliable insurance company or association or other insurer satisfactory to the commission and authorized to transact insurance business in this state, in such sum and upon such conditions as the commission may deem necessary to adequately protect the interests of the public in the use of public highways and with due regard to the number of persons and amount of property transported, with liability insurance shall bind the obligors thereunder to make compensation for injuries to persons and loss or damage to property resulting from the negligent operation of such motor carrier or contract hauler."

c. That said majority opinion erroneously construes the "Motor Carrier" Law, Art. 9, Ch. 35, R. S. Mo., 1939, Vol. 1, p. 1415, by narrowly limiting the Legislative intent, to mean such business as directly affected a common carrier, as to charges and that the omnibus provisions of Section 5729, *Supra,* that could not be required by the Legislature and that P. S. C. was without jurisdiction to require more.

"Motor Carriers" must therefore carry additional Insurance to "adequately protect the interest of the public" if the Legislative purpose of its enactment is properly regarded and the requirement to adequately protect the public and persons and property fail of its purpose, under the majority opinion.

d. The majority opinion errs in deciding Section 5729, *Supra,* and the Missouri Public Service Commission are each limited by the "Exclusion on Commercial Trucks Endorsement" so as to deny the coverage of the Statute and policy, and to exclude protection to the Public and in ruling that "Motor Carriers" in engaging in operation embraced within their enterprise, do not under the endorsements—the Statutes or terms of their Insurance policy—effect this coverage, but on the contrary are not effective, the majority opinion of such construction is so narrow that the public in Missouri is left without recourse for injuries resulting from some of the most common, continuing and omnipresent dangers incident to the operations by said truckers.

e. The majority opinion erroneously fails to respect or credit the decisions of the Supreme Court of Missouri and its Appellate Courts, as Courts of last resort and conflicts with numerous decisions contained in Missouri Court Decisions, which are by said opinion disregarded.

f. That said majority opinion conflicts with the settled course of procedure in Missouri as a complete code is set up thereby, and the Circuit Court of Clinton County,

Missouri, some three weeks prior to the filing of this petition acquired full jurisdiction of all matters involved and could make a full adjudication of all incidents therewith.

g. That said majority opinion conflicts with the established rule of Law "in Missouri" that, in construing contracts of insurance, the rule should be followed, most favorable to the insured, and the law requiring such and the Insurance Code of Missouri to be read into the contract.

QUESTIONS PRESENTED.

Only the construing of an insurance policy or bond is involved in this case. It was issued by the Hawkeye Casualty Company, admitted to Missouri for this purpose and was issued under the Laws of Missouri, and should be controlled by the Statutes of Missouri and judicial opinions therein. The Circuit Court of Appeals, by two of its judges, has handed down an opinion that avoids and annuls the policy, C. J. Woodrow has dissented thereon upholding the decision of the district Judge and affirmed that decision, by the majority opinion being enforced makes necessary this petition being presented.

REASONS FOR THE WRIT.

The scope of the Declaratory Judgment Act and the meaning of Rule 57 of the Rules of Civil Procedure for the District Court of the United States are both here involved. Both are in the foreground of developing tendencies of the law and are of great general importance and interest and their application to cases involving proceedings in state courts should be determined and settled by this court.

(2) That the majority of opinion of Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of the United States and the Supreme Court and Appellate Courts of the State of Missouri.

(3) That the Circuit Court of Appeals has decided a question of local law regarded as in conflict with local decision.

(4) That the Circuit Court of Appeals had decided important question of the Missouri rule as to construction of insurance policy which we respectfully urge should be settled by this Court.

(5) The majority of opinion of the Circuit Court of Appeals is regarded as in conflict with the cases hereinafter cited by brief.

BASIS OF JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended by Act of Congress February 13, 1925, Ch. 229, 43 Stat. 938 (28 U. S. C. A. 347).

The judgment of reversal sought to be reviewed was rendered on October 29, 1942, by two of three judges of the United States Court of Appeals for the Eighth Circuit.

The petition of the Plaintiff Hawkeye Casualty Company was filed in the District Court of the United States for the western district of Missouri, at St. Joseph, on December 20, 1941; on April 17, 1942, Otis, Judge, rendered a decision that the motor vehicle involved in the case was within the coverage of the policy at the time of the injury to persons claimed to have been injured and alleged to have been injured, and entered judgment and decree thereon.

From this judgment the Hawkeye Casualty Company took an appeal to the United States Circuit Court of Appeals for the Eighth Circuit and that Court on October

29, 1942, rendered the opinion by Judges Gardner and Riddick reversing the decree of Judge Otis and Judge Woodrough, filed a dissenting opinion affirming the decision of Judge Otis (Copy of said opinion is printed herewith, Appendix A). Thereafter these petitioners filed in said Circuit Court of Appeals a petition for rehearing, which was over-ruled November 14th, 1942.

The petition is based on the Laws of the United States, the Declaratory Judgment Act, being Section 274d of the Judicial Code (28 U. S. C. A. 400) and the lower court decided questions of substance involving matters of law, and conflicting with the established rule of law in Missouri so that it is believed the majority opinion is erroneous and that the decision should be reviewed by this Honorable Court.

The following cases it is believed sustain the jurisdiction of this court to issue its writ of certiorari:

Worcester County Trust Co. v. *Riley,* 58 S. Ct. 185, 302 U. S. 292, 82 L. Ed. 268.

Gay v. *Ruff,* 54 S. Ct. 608, 292 U. S. 25, 78 L. Ed. 1099.

Electrical Fittings Corp. et al. v. *Thomas & Betts Co. et al.,* 59 Sup. Ct. Rep. 860, 307 U. S. 241, 83 L. Ed. 1263.

PRAYER.

Wherefore, your Petitioners respectfully pray that a writ of certiorari be issued under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain therein named a full and complete transcript of the record and proceedings in the case of Hawkeye Casualty Company, A Corporation, Plaintiff, vs. Carl Halferty and J. B. Halferty, doing business as Halferty Brothers, Defendants, No. ....., to the end that this cause

may be reviewed and determined by this Court as provided for in the statutes of the United States, and that said decree and judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court and that of the District Court affirmed, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

PROSS T. CROSS,
Attorney for Petitioners.

R. H. MUSSER,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

CARL HALFERTY AND J. B. HALFERTY, DOING BUSINESS AS HALFERTY BROTHERS ET AL., PETITIONERS,

VS.

HAWKEYE CASUALTY COMPANY, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND STATEMENT.

The opinion of Judge Otis in the District Court at St. Joseph, Missouri, was handed down April 17, 1942 (R. 115-125). The opinion of the Circuit Court of Appeals was handed down October 29th, 1942, and appears as appendix A herewith. The petition for rehearing was filed within the time allowed by the rules and was overruled November 15.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended by Act of Congress February 13, 1925, Ch. 229, 43 Stat. 938 (28 U. S. C. A. 347).

STATEMENT.

Petitioners are "Motor Carriers" so designated under Art. 8, Ch. 35, Vol. 1, p. 1415, R. S. Mo., 1939, and similarly designated under the Act of Congress respecting Motor Carriers of the Interstate Commerce Act, as such were holders of a certificate of Convenience and necessity from the Public Service Commission of Missouri and the Interstate Commerce Commission.

In 1927, Missouri, as well as other States, had competitive transportation by motor carriers, that for the protection of shippers and other uses of such service, it was necessary that the public safety, convenience and efficiency be safe guarded by proper regulations, it adopted the Article referred to above, as a necessary regulation and under laws intended by the creators to have this result.

Petitioners' young men entered this field about 1935 and promptly complied with said laws by procuring the Bond or Policy of liability insurance, required by Section 5729, *supra,* before receiving such certificate and also complied with 215 of the Act of Congress, which Act requires such Carrier to pay:

> "Any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles under such certificate or permit or for loss or damage to others."

The community which Halferty Bros. serve is an agricultural and live stock producing country and farmers residing therein needed such service (R. 95) and they hauled anything a farmer has to haul, they had to take care of all his needs (R. 114) and the business would not have been profitable otherwise.

The policy issued in this case Exhibit A, pages 15-65, at page 65, contains among others, the following provisions:

> "W. Statutory Provisions; any and all provisions relating to Section 11 of this policy which are in conflict with the Statutes of the State wherein this policy is issued are understood, declared and acknowledged by the company to be amended to conform to such statutes."

Exhibit "A," Page (17 R.):

> "Coverage a Bodily Injury Liability; to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile."

Page (17 R.):

> "Defense, Interest, Costs And Medical Aid: The company agrees to provide, in the insured name and behalf, a defense to any suit against him, alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent."

The policy is limited to $5,000 for each person and a total of $35,000 as to each accident. Of the several indorsements attached to the policy, at Page (15 R.) and on several others is a stamped indorsement, as follows:

> "The Missouri Public Service Commission indorsement, which is the top indorsement attached to this Policy, takes precedence over any provision of other indorsement attached to this Policy."

Page (41 R.) is the Public Service Commission indorsement referred to.

"Missouri Public Service Commission Endorsement
(Interstate.)

In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby waives a description of the motor vehicles insured hereunder and agrees to pay any final judgment rendered against the assured, for personal injuries, including death resulting therefrom, to all persons, except employes of the assured engaged in the course of their employment and/or damage to property, except property owned by, leased, hired or in the custody and control of the assured caused by any and all motor vehicles operated by the assured pursuant to the Certificate of Convenience and Necessity issued by the Public Service Commission of Missouri, within the limits set forth in the schedule herein; and further agrees that upon its failure to pay any such final judgment, such judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment. Nothing contained in the policy or any endorsement thereon nor the violation of any of the provisions thereof by the assured shall relieve the Company from liability hereunder or from the payment of any such final judgment."

Thereafter (page 49 R.) is the endorsement, by which the company attempts to commit "Hara-kiri" upon the whole policy.

Pages 15, 19, 25 and 31 R. show the cash premium of $1,231.81 paid as premium for the policy.

In line with the business Halferty Brothers conducted, their trucks were engaged in September, 1941, by Mr. Daniel O'Connor in harvesting a crop of sargo, grown on his premises and this farm product was taken in bundles and hauled by truck from the land where grown onto the highways and unloaded on another part of the farm, where it was placed in trenches, to be used thereafter as feed for cattle.

The Petitioners also transported water, over the highways from Plattsburg to dampen the sargo in the trenches, to prevent its burning.

On September 19, 1941, one of these trucks was on the highway within the territorial limits of its route and while returning to the Depot in Plattsburg an accident occurred along the highway. From this arose some five actions at law, filed in the Circuit Court, Clinton County, Missouri, in November, 1941, and were against these petitioners (page 83 R.).

Thereafter the Hawkeye Casualty Company on December 20, 1941, filed this action in the District Court of the United States at St. Joseph, Missouri, where, at the hearing, Otis, Judge, construed said policy as providing coverage of these accidents.

Appeal was taken by the Hawkeye Casualty Company to the Circuit Court of Appeals for the Eighth Circuit and on October 29, 1942, Judges Gardner and Riddick filed opinion reversing the findings of Judge Otis and Woodrough filed a dissenting opinion sustaining and affirming Judge Otis.

BRIEF.

By Sec. 5736, Art. 8, Ch. 35, p. 1434, R. S., 1939, the Legislature enacted as follows:

> "It is hereby declared that the legislation herein contained is enacted for the sole purpose of promoting and conserving the interests and convenience of the public, and that no right, privilege, or permit granted or obtained under or by virtue of this article shall ever be construed as a vested right, privilege, or permit; and the general assembly retains full legislative power over, concerning and pertaining to the subject or subjects legislated upon in this article and the power and right to alter, amend or repeal this article at its pleasure."

The Missouri Supreme Court in *State ex rel. Laundry, Inc.*, v. *P. S. C.*, 34 S. W. 2d l. c. 42, held:

> "The Public Service Commission Law of our own state has been uniformly held and recognized by this court to be a remedial statute, which is bottomed on, and is referable to the police power of the state, and under well-settled legal principles, as well as by reason of the precise language of the Public Service Commission Act itself, is to be 'liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.' *State ex rel* v. *Public Service Commission*, 275 Mo. 201, 206, 204 S. W. 497; *State ex inf.* v. *Gas Co.*, 254 Mo. 515, 535, 163 S. W. 854. The rule of liberal construction thus uniformly accorded by this court to the Public Service Commission Law is consonant with the universal rule applicable to similar remedial statutes, which is to the effect that 'laws enacted in the interest of the public welfare or convenience should be liberally construed, with a view to promote the object in the mind of the legislature, by suppressing the mischiefs and advancing the remedy.' 36 Cyc. 1173-1175."

Petitioners respectfully say that in the majority opinion *Trinity Universal Ins. Co.* v. *Cunningham,* 8 Cir., 107 F. 2d 857, 861, is misconstrued and that a very narrow construction is given "pursuant" and that such construction is not intended by said opinion, quoting 861:

> "To construe this phrase as interpreted by appellant would be a strict construction and would not be in conformity with the general intent and purpose of the rules of the Commission contained in the endorsement or rider. A more reasonable and, we think, the proper interpretation is, 'pursuant,' in the sense of 'acting or done in consequence' of the permit of convenience and necessity, and in the prosecution of the business authorized therein. In so far as the certificate of convenience and necessity is concerned it was complete when it recited permission to serve a certain route. It was the business and permit to operate upon a certain route that comprised the certificate of convenience and necessity. It had to do with the nature of the transportation, not with the character of the operation.
>
> "We are satisfied that the provisions of the policy covered any motor vehicles used by the assured in his business within the territory authorized by the certificate of convenience and necessity and while the permit was suspended. And this finding carries out the general purpose of the Missouri Bus and Truck Law and the regulations of the Commission to provide for the protection of the general public in respect to accidents caused by trucks operated in the business for which the permit was issued. See *Sills* v. *Schneider,* 197 Wash. 659, 86 Pac. 2d 203; *City of Detroit* v. *Drivers' Assn.,* 254 Mich. 263, 237 N. W. 61, 74 A. L. R. 1306; *Sandolovich* v. *United States Fidelity and Guaranty Co.,* 142 Misc. 463, 254 N. Y. S. 563; *Hindel* v. *State Farm Mut. Auto Ins. Co.,* 7 Cir., 97 F. 2d 777; *Liberty Mut. Ins. Co.* v. *McDonald,* 6 Cir., 97 F. 2d 497."

The policy or bond in controversy, page 15 to 65 R., is a Missouri contract and as such under the repeated decisions of the Missouri Courts is to be construed by

the laws and decisions of Missouri, and it is respectfully submitted that the Circuit Court of Appeals failed to give credit to

Eric C. v. *Tompkins,* 58 S. Ct. 817, 304 U. S. 64;
Stoner v. *N. Y. Life Ins. Co.,* 61 S. Ct. 336, 311 U. S. 464.

A statutory bond or insurance policy is such that the statute requiring it becomes a part and parcel of the obligation assumed by their makers and, if the statute so provides, it becomes an obligation to be enforced, notwithstanding the omission of the particular obligation in the written instrument, for such statute, the parties are deemed to have had notice and to have contracted accordingly.

Fogarty v. *Davis,* 264 S. W. 879, l. c. 880.
State ex rel. v. *Rubber Mfg. Co.,* 149 Mo. l. c. 212, 50 S. W. 330.
Zellars v. *Surety Co.,* 210 Mo. l. c. 92, 108 S. W. 549.
School District v. *Casualty Co.,* 104 S. W. 2d 319, l. c. 325, 340 Mo. 1070.
State v. *Wipke,* 133 S. W. 2d 354, l. c. 356.
State v. *Vienup,* 147 S. W. 2d 627, l. c. 628.
State v. *Hartford Indemnity,* 143 S. W. 2d 483, l. c. 485.
Aschenbrenner v. *U. S. F. & G. Co.,* 54 S. Ct. 590, l. c. 592, 292 U. S. 80-84.

The Missouri Supreme Court, by Douglass, Judge, in *State ex rel.* v. *Sheible et al.,* 163 S. W. 2d 559, l. c. 560, on July 1st, 1942, thus quotes the law of Missouri:

> "The general rule requires that a bond should be construed to carry into operation the reasonable intention of the parties, and such construction should be given, when it can be fairly done, to support rather than defeat the bond. 11 C. J. S., Bonds, Sec. 40. Furthermore, the rule is established in this State 'where a bond is given in pursuance of a statute, courts will, in enforcing the bond, read into it the

terms of the statute which have been omitted, and will likewise read out of it terms included in it that are not authorized by the statute.' *State* v. *Wipke*, 345 Mo. 283, 133 S. W. 2d 354, 357; *State* v. *Vienup*, 347 Mo. 382, 147 S. W. 2d 627.

"We had a case involving similar doctrines before us in *Forgarty* v. *Davis*, 305 Mo. 288, 264 S. W. 879, 880. In that case the court found that through inadvertence the wrong printed form of bond was used. However, it held that the statutory provisions intended must be read into the bond given, stating: 'The rule in this state is that, in construing a statutory bond, the provisions of the statutes must be read into it and construed as a part of it. "When parties execute a statutory bond they are chargeable with notice of all provisions of the statute relating to their obligation, and those provisions are to be read into the bond as its terms and conditions. * * *."' "

The rulings of the highest courts in Missouri have established the ruling that where there are several provisions in the contract of insurance, in construing it, the insured is entitled to that construction which is most favorable to him and which provides him the greater indemnity.

Mathews v. *Modern Woodmen*, 236 Mo. 326, 342 343, 139 S. W. 151, 155, Ann. Cas. 1912D, 483.

Salamone v. *Prudential Ins. Co. of America*, 103 S. W. 2d 506, l. c. 508.

Dolph v. *Maryland Casualty Co.*, 261 S. W. 330, l. c. 332-333.

Robinson v. *Corum Casualty Co.*, 27 S. W. 2d 49-51.

Machkey v. *Corum Casualty*, 34 S. W. 2d 564.

Heald v. *Aetna Ins. Co.*, 90 S. W. 2d 797.

Repugnant and conflicting clauses on policies as additional provisions are not permitted under the law of Missouri, as such repugnant and conflicting provisions engender ambiguity.

Wheeler v. *M. B. H. A. Assn.*, 157 S. W. 2d 554, l. c. 557.

Hoover v. *National Casualty Co.*, 162 S. W. 2d 363, l. c. 365.

Drucker v. *Eastern Indemnity Co.*, 223 S. W. 989, l. c. 991.

McAlister v. *Life Insurance Co.*, 251 S. W. 98, l. c. 100.

Cave v. *Physicians Indemnity Co.*, 45 S. W. 2d l. c. 908.

Stewart v. *N. A. Acc. Ins. Co.*, 33 S. W. 2d 1005, l. c. 1007.

Koch v. *Menaugh*, 84 S. W. 2d 383, l. c. 385 (1-2).

Davis v. *Mutual Ins. Co.*, 119 S. W. 2d 493 (4).

Williams v. *Union Central*, 291 U. S. 170, 180, 54 S. Ct. 348-352, 78 L. Ed. 711.

Missouri under its legislative control provides in its insurance code the following:

Vol. 1, Sec. 6077, R. S. Mo., 1939, p. 1532, provides, among other things,

> "nothing herein contained shall permit an insurance company to issue policies in violation of other provisions of the insurance laws of this state * * * The superintendent and attorney general are hereby directed to approve for use in this state only policies conforming to the express provisions of the insurance laws of Missouri, and only such words, phrases, figures, terms and conditions of policy forms, riders, endorsements, supplementary or additional terms and provisions affecting policies or agreements for insurance which are specific, certain and unambiguous, to meet the needed requirements for the protection of lives and property of assureds."

Vol. 1, Sec. 6009, R. S. Mo., 1939, p. 1510, provides:

> "In respect to every contract of insurance made between an insurance company, person, firm or association, whether a stock, a mutual, a reciprocal or other company, association or organization, and any person, firm or corporation, by which such person, firm or corporation is insured against loss or

damage on account of the bodily injury or death * * *, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company, if liability there be, shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, or if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation or any part is due or unpaid; occasioned by said casualty."

Vol. 1, Sec. 6010, R. S. Mo., 1939, p. 1510, further provides:

"Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death, * * * if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company, person, firm or association as described in the preceding section, and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment."

The "Quizzling" attitude assumed by the Insurance Company is not supported by the laws of Missouri, and the proceedings first filed in the Clinton County Circuit Court are protected by the laws of Missouri, and in the event of an adverse judgment no right is taken away from the Insurance Company by Sec. 60010, R. S. Mo., 1939, p. 1510, as the company has its remedies under that statute.

It is therefore respectfully submitted that there should be no conflict between the Federal Court rules or of the 8th Circuit against the established law of Missouri, nor the rulings of this Honorable Court in that regard.

PROSS T. CROSS,
Attorney for Petitioners.

R. H. MUSSER,
Of Counsel.

APPENDIX "A."

United States Circuit Court Of Appeals Eighth Circuit September Term, 1942. Hawkeye Casualty Company, a corporation, Appellant, vs. Carl Halferty and J. B. Halferty, doing business as Halferty Brothers, et al., Appellees. Appeal from the District Court of the United States for the Western District of Missouri. No. 12,288

Before Gardner, Woodrough, and Riddick, Circuit Judges.

Riddick, Circuit Judge delivered the opinion of the Court.

This is a declaratory judgment action, the decision of which turns upon the interpretation of a policy of casualty insurance issued by the appellant to the appellees Carl and J. B. Halferty, partners operating as common carriers of freight by motor truck in the State of Missouri and between points in Missouri and adjoining states.

As common carriers in both interstate and intrastate commerce, the appellees held the required certificate of public convenience and necessity of the Public Service Commission of Missouri and the permit of the Interstate Commerce Commission, and the policy of insurance in question was conditioned as provided by the laws of Missouri (Mo. Rev. Stat. (1939) §5729, p. 1422), and by the laws of the United States (Motor Carrier Act of 1935, 49 U. S. C. A. 315). Inasmuch as the accident which gives rise to this litigation occurred in an operation wholly intrastate, we are concerned here only with the provisions included within the policy by the command of the State of Missouri.

The applicable statute of the State of Missouri requires that no certificate of public convenience and necessity shall be issued by the Public Service Commission to any common carrier by motor vehicle until the carrier

shall have filed with the Commission a liability insurance policy approved by the Commission, ". . . in such sum and upon such conditions as the Commission may deem necessary to adequately protect the interests of the public in the use of public highways and with due regard to the number of persons and amount of property transported, which liability insurance shall bind the obligors thereunder to make compensation for injuries to persons and loss or damage to property resulting from the negligent operation of such motor carrier . . . " Mo. Rev. Stat. (1939) §5729, p. 1422.

On November 29, 1940, the Halfertys applied in writing to the appellant for the policy of insurance involved in this case. The application was accepted and the policy delivered, dated December 2, 1940, to become effective on December 16, 1940, and on the date last mentioned it was filed with and approved by the Missouri Public Service Commission.

In the written application for the insurance the appellees stated that they were operating ten motor trucks under authority as common carriers, hauling livestock and general merchandise in the vicinity of Plattsburg, Missouri, and within a radius of fifty miles from that point. It was further stated in the application that the policy requested was required to be filed in the State of Missouri, and that the special endorsement required by that state must be attached as a part of the policy. Insurance was requested to cover the liability of the assured, arising from the operation of their trucks, for bodily injuries, property damage, and damage to cargo carried. On the reverse side of the application appeared a list and description of the trucks on which insurance was desired and a notation that the policy should be endorsed to cover merchandise owned by the assured.

Printed at the top of the policy issued were the words "Standard Automobile Policy All Coverage Form." The policy form used provided spaces in the body of the

policy for all coverages with the stipulation that "The insurance afforded is only with respect to such and so many of the following coverages as are indicated by a specific premium charge or charges set opposite thereto." The coverages for which premiums were stated and charged in the policy were only those specified in the application. On the face of the policy appeared the statement that the motor vehicles insured were to be used for commercial purposes. The term "commercial" was defined as "the transportation or delivery of goods or merchandise and other business uses in direct connection with the assured's business occupation, . . . including occasional pleasure use for the named insured and family." The policy concluded with the provision "This policy is issued and accepted subject to the conditions, limitations agreements, and warranties set forth herein and endorsed hereon."

Attached to the policy form used were fifteen endorsements or riders. Many of these endorsements covered matters of no relevance here, such as the transfer of insurance from trucks originally owned by the assured to other trucks bought to replace them. The endorsements of importance in the decision of this case are two: one entitled "Missouri Public Service Endorsement (Intrastate)", and another entitled "Exclusion on Commercial Trucks." The first endorsement, so far as important here, provided:

> "In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby waives a description of the motor vehicles insured hereunder and agrees to pay any final judgment rendered against the assured, for personal injuries, including death resulting therefrom, to all persons, except employees of the assured engaged in the course of their employment and/or damage to property, except property owned by, leased, hired or in the custody and control of the assured caused by any and all motor vehicles operated by

> the assured pursuant to the Certificate of Convenience and Necessity issued by the Public Service Commission of Missouri within the limits set forth in the schedule hereon . . . . "

and the second:

> " . . . This policy does not cover any claim or suit brought by any person for injuries or death if said injuries or death were sustained while riding in or upon any vehicle covered under this policy. The above exclusion of coverage does not apply to the owner, or his agent, of goods or merchandise, who is riding in or upon the vehicle insured hereunder at the time his goods or merchandise are being transported."

Both of the above endorsements were executed by the appellant prior to the effective date of the policy and each contained a provision to the effect that it should take effect as of the effective date of the policy and expire with the expiration of the policy.

Stamped on the face of the policy and upon the endorsement entitled "Exclusion on Commercial Trucks", were the following words: "The Missouri Public Service Commission endorsement, which is the top endorsement attached to this policy, takes precedence over any provision of or other endorsement attached to this policy.

Under Missouri law pertaining to common carriers by motor vehicle, carriers so operating are required to file with the Public Service Commission schedules of rates and charges made by them for the services which they are authorized to perform, and the certificate of public convenience and necessity specifies the route over which the holder of a certificate is permitted to operate. In this case the appellees were granted the right to operate over an irregular route between points in the State of Missouri. They complied with the law with reference to the filing of rates and charges.

Among the vehicles insured was a Chevrolet truck of 1-1/2 tons capacity. The appellees, under contract with a

neighboring farmer, furnished this truck and a driver to the farmer for hauling cargo from points on the farm to silos on the farm. This hauling required the occasional use of the truck on county roads adjacent to the farm in getting from one point on the farm to another. After the work in question had been completed and while the policy in question was in effect, the driver was returning from the farm to Plattsburg, Missouri, where the appellees' motor vehicles were kept and from which point they operated as common carriers, when an accident occurred. Riding in the truck as guests of the driver were eighteen or nineteen of the farmer's laborers. Several of them were injured, one fatally. A number of suits were brought in the Missouri courts against appellees to recover damages for those injured in the accident. The defense of these suits was tendered to the appellant insurance company and declined on the ground that the liability, if any, upon the appellees as a result of the accident, was not one covered by the policy. In order to settle this controversy between the parties, the insurer brought this suit in the district court for a judgment declaring that the policy did not cover the liability of the appellees in the circumstances stated and that the appellant was not obligated nor liable in any way to defend the suits in the state courts nor to pay any judgment that might be rendered in favor of the plaintiffs in them. The appellant contends that at the time of the accident the truck involved was not being operated in the appellees' business as a common carrier; that for this reason the Missouri Public Service Commission endorsement has no application; and that the endorsement covering exclusion on commercial trucks by its terms relieved the appellant from liability. The appellees contend that the policy covers all liability imposed by law upon the appellees as a result of accidents occurring in the operation, use, or ownership of its trucks; that the Missouri Public Service Commission endorsement so provided, and this, whether the trucks were engaged in the business of the appellees

as common carriers or otherwise; and that this endorsement, having precedence over all others on the policy, was effective to save the appellees from the limitation of liability expressed in the "Exclusion on Commercial Trucks" endorsement, which, but for the Missouri Public Service Commission endorsement, clearly relieved appellants of liability in this case.

These conflicting contentions present the issue here. The decision of the district court was in favor of the appellees.

We are of the opinion that the appellant's construction of the insurance contract is the only one permissible. It is not denied that the only jurisdiction or power in the Missouri Public Service Commission with reference to the insurance involved here concerns the operation of motor vehicles as common carriers. Parties not engaged in such an operation are not required by the laws of Missouri to carry any insurance. It follows that under Missouri law the parties to the insurance contract were at liberty, so long as not operating as common carriers, to make any contract of insurance they thought proper or to limit the coverage in any contract made as their interests might dictate. Only as to their business as common carriers were the appellees required to take and the appellants to deliver insurance conditioned as required by the Missouri law. Since the jurisdiction of the Public Service Commission over the character of insurance carried by persons operating automobiles in Missouri extended only to the operations of common carriers, it must be assumed that the Commission did not attempt to exercise any power or authority over motor vehicles not being operated as common carriers. No reason appears why a common carrier operating motor vehicles in Missouri might not, after complying with the laws of Missouri applicable to his business in reference to insurance, carry such other and further insurance as he deemed wise, or necessary to his protection. The endorsement of the Missouri Public Service Commission applied only

to motor vehicles operated in the business of common carriers and was without application in the case of a motor vehicle not so used or operated.

The endorsement in question, by its terms, made the insurer liable to pay any final judgment rendered against the assured for personal injuries or damage to property, with exceptions not pertinent here, ". . . caused by any and all motor vehicles operated by the assured pursuant to the Certificate of Convenience and Necessity issued by the Public Service Commission of Missouri within the limits set forth in the schedule hereon . . . ." In common acceptance "pursuant" means "in conformity with or according to." Webster's International Dictionary. And this court has held in construing, under Missouri law, the identical endorsement under consideration here, that the word is to be given the significance stated, saying: ". . . the proper interpretation is 'pursuant,' in the sense of 'acting or done in consequence' of the permit of convenience and necessity, and in the prosecution of the business authorized therein." *Trinity Universal Insurance Company* v. *Cunningham,* 8 Cir., 107 F. (2d) 857, 861. In this opinion it is said: "It is clear that under these statutes the Commission's power to require the carrier to purchase liability insurance as a prerequisite to granting a permit is limited to those vehicles used in the transportation service over which the Commission has supervision. The phrase then may be interpreted to exclude from the scope of the coverage those vehicles not under the Commission's supervision."

The Supreme Court of the State of Kansas in *Smith* v. *Republic Underwriters,* 152 Kansas 305, 103 Pac. (2d) 858, has reached the same result in construing an identical policy endorsement required by the State of Kansas, holding that a truck of a Kansas carrier was not covered when at the time of the accident the truck was not being operated pursuant to the state permit issued to its owner as a common carrier. Other cases sustaining this interpretation of the endorsement are: *Flythe* v. *Eastern Caro-*

lina Coach Co., 143 S. E. 865; *Foster* v. *Commercial Standard Ins. Co.*, 121 F. (2d) 117; *Caines* v. *Wheeler*, 268 S. W. 1098; *Motor Car Indemnity Exchange* v. *Lilienthal*, 229 S. W. 708. No authorities to the contrary have been cited by the appellees and we have found none.

The trial court found that the operation in which the appellees' truck was engaged at the time of the accident which gives rise to this suit was not of the character covered by the certificate of public convenience and necessity under which the appellees operated as common carriers of freight. But the court attached no significance to this fact. It held that the endorsement of the Missouri Public Service Commission was controlling and interpreted this endorsement to impose on appellant the obligation to defend any suits and pay any judgments against the appellees resulting from any operation or use of its motor vehicles by the appellees, whether or not authorized by the certificate of convenience and necessity.

The court's conclusion as to the character of the operation of the appellees' truck at the time of the accident was correct. The truck was not engaged in any operation for which a permit from the state was required. The appellees had not filed with the Public Service Commission any schedule of rates or charges for work of the character in which the truck was engaged at the time of the accident nor were they required to do so. The appellees, in addition to their business as common carriers, regularly engaged in operations not controlled by their certificate of public convenience and necessity as common carriers, and for which they made such charges as they desired or were able to secure. The provision in the Missouri Public Service Commission endorsement, waiving identification of cars insured, is not of the importance given it by the lower court in interpreting that endorsement as applied to the facts in this case. As was pointed out by the Supreme Court of Kansas in *Smith* v. *Republic Underwriters, supra,* this provision is a necessary one in policies of insurance covering the operation of the common car-

rier because of the frequent necessity upon the carrier of making changes in and additions to operating equipment in order to meet its obligations to the public. The effect of this provision was merely to cover any truck of the insured when operated in their business as a common carrier, whether or not specifically described in the policy.

Nor are the words stamped on the policy, giving the Missouri Public Service Commission endorsement precedence over all provisions in the policy, effective to change the interpretations of the policy above expressed. These words must be interpreted, as the endorsement itself, in the light of the power and authority of the Public Service Commission. So interpreted, they cannot control other provisions of the policy in their application to operations of the assured in no wise connected with their business as common carriers.

Since the truck involved in the accident under consideration was not engaged at the time of the accident as a common carrier of freight under the appellees' certificate of public convenience and necessity, the endorsement of the Missouri Public Service Commission, limited to such operations, has no application in this case. The situation in all respects is as if the appellees were not engaged as common carriers, and as if no such endorsement was contained in the policy. In such circumstances the assured was relieved from liability for damages arising out of the injury to persons riding in one of its trucks by the "Exclusion on Commercial Trucks" endorsement. The parties attached the "Exclusion on Commercial Trucks" endorsement to the policy, for the purpose of relieving the appellant of liability to the appellees for injuries to persons carried on the appellees' trucks, except owners of property or their agents transported by the appellees as common carriers pursuant to the certificate of authority. It is not necessary to decide here whether this exclusion of liability may not be effective even while the truck involved was engaged in a part of appellees'

operations as common carriers of freight. It is clear that it does apply where the truck involved in the accident, as here, was not so engaged. Since the appellees applied for insurance as common carriers of freight, having received a certificate to operate as such, neither the parties nor the Public Service Commission contemplated at the time of the issue of the policy the coverage of the liability as carriers of passengers. The risk upon the insurer in covering liability for injuries to passengers is entirely different from that assumed concerning liability for injuries to freight.

For the reasons stated, the judgment of the district court is reversed, and the case is remanded for judgment.

Before Gardner, Woodrough and Riddick, Circuit Judges.

Woodrough, C. J., Dissenting.

Only the construction of an insurance policy is involved in this case, but the form construed appears to be the standard form used to provide the public in Missouri with the insurance protection required by the state statute against negligent operations of truckers to whom certificates of public convenience and necessity have been issued. The construction of the policy adopted by the majority limits the insurance company to such a narrow obligation that no recourse against it is left to the public in Missouri for injuries resulting from some of the most common, continuing and omnipresent dangers universally incident to the operations of such truckers. Certainly driving a truck that is empty of merchandise back to its garage at the close of day (which is the instant case) presents a hazard to the public of exactly that character and the declaratory judgment is that there is no insurance. The rational of the decision is that the insurance company has no liability to the public unless at the time of an injury the trucker's motor vehicle involved is mov-

ing in the carriage of freight on fixed schedule. The conclusion is not predicated upon any Missouri decision but purports to follow federal decisions and decisions in states other than Missouri. As I can not agree, the importance of the public interest necessitates a brief expression of dissent.

The applicable Missouri Statute (Sec. 5729) provides that no certificate of public convenience and necessity shall be issued to any common carrier by motor vehicle in the state until liability insurance is furnished to compensate members of the public for injuries resulting from the negligent operations of the person to whom the certificate is issued, and the policy in suit was applied for and the insurance company issued it to meet the statutory requirement. We have no adequate picture of how the business of common carriers of freight by automotive vehicles is ordinarily carried on in Missouri, or what ordinarily constitutes their operations, but it sufficiently appears that such carriers do not confine the use of all their trucks all of the time to scheduled hauls. The fact that the trucks are useful and used for some other services is a main factor in the competition of the industry with the railroads whose vehicles are confined to their tracks, and doubtless any such restriction of truck uses would be gross economic waste. Under Missouri law, therefore, the carrier's certificate is issued to the truckers without limiting them either as to the number of their trucks or the manner of using them in the business. Their certificates permit them to own, borrow or lease and make any proper use of trucks. The hauling of freight on certain routes designated for them by the state commission is regulated by requiring fixed tariffs to be posted and followed.

The insurance companies have developed their automobile policies into standard forms and upon the enactment of the above statute the companies and the Missouri Commission were confronted with some difficulty in selecting appropriate wording for an endorsement or rider

to be incorporated in the standard forms to provide the insurance required by the Missouri law and at the same time effect reconciliation as complete as possible with the standard form provisions. The provisions of standard forms of automobile insurance (evolved in great prolixity through insurance experience) insure particularly described automobiles, whereas the Missouri law as stated requires an insurance to compensate members of the public injured by negligent operations of persons to whom certificates are issued without regard to the number or description of their vehicles.

To meet the difficulties of composition the rider was started out with the clear cut agreement of the insurance company that it waived a description of the motor vehicles insured. But practically all the standard form provisions were in terms predicated on and related to particularly described automobiles and especially the fundamental matter of premiums was so related. The insurance contract as a whole would not make sense without the use of some clause in the rider to supply a general identification of trucks. As to the operations of the trucks, the insurance company was doubtless fully informed of the truck carrier business in Missouri and its risks and the standard form made ample and fair provision concerning operations, included and excluded. The lack in the contract after waiver of specific description of trucks was of some kind of description of trucks to be covered. To meet the law such description had to be co-extensive with the right of the trucker receiving a certificate to operate any trucks he could use to advantage. Accordingly, compliance with the law and restoration of coherence in the insurance contract was effected by concluding the rider with the insurance company's agreement to pay any final judgment for injuries to all persons * * "caused by any and all motor vehicles operated by the assured pursuant to the certificate of convenience and necessity issued by the Public Service Commission of Missouri within the limits etc."

It seems clear to me in view of the situation that the reference to the certificate in the rider was intended solely as a means of generally describing trucks to be covered, supplying the hiatus in the contract caused by the waiver of specific description with which the rider began.

Such construction assumes an honest intention of all the parties to comply with the Missouri law and to insure the public against the hazards to which it became subjected by the operations of the truckers to whom the certificate was issued. When such truckers carried on their business in the ordinary way and complied with the regulations prescribed for them by the Commission, their operations were within the contemplation of their certificate and pursuant thereto in a fair and reasonable sense. To construe the clause as a limitation upon the operations to be insured against it seems to me there would have to be an unjustifiable interpolation to make it read "while being operated."

Whether the insurance companies ought to be chargeable for the injuries to riders picked up by the truckers' drivers is beside the question. Drivers are human and the fellowmen they pick up are included by the words "any person" in the Missouri statute. I do not find, either in the rider or in the policy as a whole, sufficient justification for declaratory judgment by the federal court which leaves the public in Missouri without insurance protection against the ordinary hazards of carriers' operations. The legislative intent appears to me to be directly to the contrary. The decision of the trial court appears to me well reasoned and sound, and I would affirm it.

JAN 23 1943
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 652

CARL HALFERTY AND J. B. HALFERTY, DOING BUSINESS AS HALFERTY BROTHERS, ET AL., PETITIONERS,

VS.

HAWKEYE CASUALTY COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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With whom are:

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RESPONDENT'S SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

This case does not fall within the class of reviewable cases mentioned in Rule 38.

The only question presented for review is whether the Circuit Court of Appeals correctly construed a contract of insurance made by the respondent with the petitioners. In the language of the petition for the writ:

> "Only the construing of an insurance policy or bond is involved in this case" (Petition p. 4).

Briefly stated, the case is this:

In September, 1941, one O'Connor, a farmer, by a special or individual contract, employed petitioners, who were engaged in the trucking business, both as a motor carrier (which means "common carrier," R. S. Mo., Sec. 5720 (b)), and as a contract hauler (which means one engaged in the transportation of persons or property for a particular person under special agreement, R. S. Mo., Sec. 5720 (c)), to haul sargo from the fields on his farm to

silos located on the same farm for an agreed price. One of the trucks owned by petitioners was used in that work. At the end of a work day a number of men employed in the field by O'Connor obtained the consent of the driver of the truck to allow them to ride on it to Plattsburg, a distance of three or four miles, where the truck was to be stored for the night. While riding on the truck an accident occurred, resulting in injury to four of the passengers and the death of one of them. Five suits were instituted in the state circuit court against petitioners and the driver of the truck to recover damages.

Prior to the accident the petitioners had applied to and received from the Public Service Commission of Missouri a Certificate of Convenience and Necessity authorizing them "to operate as motor carriers of freight over an irregular route from a point approximately four miles from Gower, Missouri, to all points in Missouri and from all points in Missouri to said point of operation" (Rec. 96). The Commission required the petitioners to and they did file and publish their schedule of rates as common carriers. They were also required to and they did procure and file a policy of insurance issued by respondent by which respondent agreed "to pay any final judgment rendered against the assured, for personal injuries, including death resulting therefrom, to all persons, except employes of the assured, engaged in the course of their employment and/or damage to property * * * caused by any and all motor vehicles operated by the assured pursuant to the Certificate of Convenience and Necessity issued by the Public Service Commission of Missouri within the limits set forth in the schedule hereon" (Rec. 75).

A controversy having arisen between petitioners and respondent as to whether the respondent was obligated, under the terms of the policy, to defend the suits for damages or pay the judgment recovered in any of them, respondent brought an action in the District Court of the United States under the Federal Declaratory Judgment Act to obtain a judgment declaring that it was not re-

quired to defend or pay any judgment recovered in any of the damage suits on the ground that, at the time of the accident, the truck was not being operated "pursuant to the Certificate of Convenience and Necessity" and therefore was not within the policy coverage. The petitioners contended that the words in the endorsement "pursuant to the Certificate of Convenience and Necessity issued by the Public Service Commission of Missouri" should be ignored in construing the policy; and that the truck was within the coverage if, at the time of the accident it was being *operated*—whether for the owners' pleasure, or to transport their own property, or to accommodate a guest who desired to ride, or what not.

The court below construed the policy and held that the truck was not within the coverage at the time of the accident because at that time it was not being operated pursuant to the Certificate of Convenience and Necessity (Appendix A, p. 21 *et seq.*). In so holding the court followed one of its own decisions, the decision of the Supreme Court of the State of Kansas, in *Smith* v. *Republic Underwriters,* 152 Kan. 305, 103 Pac. 2d 858, construing an identical policy endorsement required by the State of Kansas, and other cases cited in the opinion.

As stated in the opinion of the court below, no authority was cited by petitioners there, and not a single case is cited in this court showing that the construction put upon the policy by the court below is contrary to the opinion of any federal court, or of the Supreme Court of Missouri or any of its Courts of Appeal, or of any Court of any other state.

II.

None of the three cases cited by petitioners as warranting the issuance of the writ is applicable.

In *Gay* v. *Ruff,* 292 U. S. 25, 78 L. Ed. 1099, the court granted certiorari because of a conflict in the decisions of the federal courts on a question of federal law.

In *Electric Fittings Corporation* v. *Thomas & Betts Company*, 307 U. S. 241, 83 L. Ed. 1263, the writ was granted because of the conflict of decision between the Circuit Court of Appeals of the Second and Ninth Circuits in a patent case.

In *Worchester County Trust Company* v. *Riley*, 302 U. S. 292, 82 L. Ed. 268, the writ was granted because the case involved "an important question of Federal law which has not been but should be settled by this court."

In the instant case, there is no conflict of opinion between the court below and any other federal (or state) court. Nor is there any question of federal law involved. No question was raised in the court below as to the jurisdiction of the trial court under the Federal Declaratory Judgment Act, nor as to the validity, construction or application of that Act; and no such question is presented here.

The case involves only the construction of a contract of insurance between an insurer and the assured; and the liability of the insurer under the policy as construed on the particular facts shown in the record. We submit the writ should be refused.

Respectfully submitted,

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